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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JANE ROE, individually, and as a
representatives of the class,

Plaintiffs,

vs.

FRITO-LAY, INC.; and DOES 1-10
inclusive,

Defendants.

) CASE NO.: 3:14-CV-00751-HSG

) **MOTION FOR PRELIMINARY**
) **APPROVAL**

) Judge: Hon. Haywood Gilliam, Jr.
) Courtroom: 15

) Hearing Date: July 28, 2016

) Time: 2:00 P.M.

) Location: Courtroom 15, San Francisco
)

1 Now come the Plaintiffs, by and through counsel hereby move the Court
2 pursuant to Federal Rule of Civil Procedure 23 for preliminary approval of the class
3 settlement, certification of a class for the purposes of settlement, and approval of
4 form and manner of notice. The Plaintiff seeks an Order:

- 5 1) Conditionally certifying a Settlement Class comprised of the Settlement
6 Class Members;
7 2) Preliminarily approving the Settlement Agreement and Release;
8 3) Approving the proposed Notices of Class Action Settlement;
9 4) Certifying Plaintiff Jane Roe as Class Representatives;
10 5) Appointing Plaintiff's counsel as Class Counsel; and
11 6) Appointing a Settlement Administrator;

12 A memorandum in support is attached hereto and incorporated herein.

13 Respectfully submitted.

14 DATED: June 23, 2016

DEVIN H. FOK ESQ.
DHF LAW, P.C.

15
16 By: /s/ Devin H. Fok
17 Devin H. Fok
18 Attorney for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jane Roe, individually and on behalf of the Settlement Class seek preliminary approval of the proposed Settlement Agreement with Defendant Frito-Lay, Inc. (“Defendant” or “Frito-Lay”). The Settlement Agreement between Plaintiff and Defendant (collectively, the “parties”), if approved, will resolve all claims of the Plaintiffs and all members of the class in exchange for Defendant’s agreement to pay \$950,000 into a common settlement fund. Declaration of Devin H. Fok (“Fok Decl.”) Ex. 4, Stipulation and Settlement of Class Action Claims (“SA”), P.7, ¶II.I. The settlement is a *claims-paid* process involving no reversion. SA, P. 7, ¶II.K. The class size is 2,928 members. SA, P. 9, ¶III. This nets each class member approximately \$324.45 before deduction for attorney’s fees, costs, and class representative’s discretionary service award.

The identity of the class members have been identified through formal discovery of electronic records including subpoena to third-parties. Specifically, the databases of Defendant’s background screening vendor First Advantage, Inc. (“FADV”)¹ and Defendant’s applicant tracking system vendor Human Resource Management Center, Inc. (“HRMC”) were reviewed and analyzed by Plaintiff’s counsel and her retained database expert Mr. Hank Valk. SA, P. 8-9, ¶III. To ensure complete identification of all prospective class members, Defendant has also undertaken to manually review paper-files to determine the class membership of individual applicants not already identified if any. SA, P. 9, ¶III.

The proposed settlement of this action is the product of hard-fought and lengthy arm’s-length negotiations by experienced and informed counsel and warrants preliminary approval, as the terms are “fair, reasonable, and adequate.” Fed. R. Civ.

¹ Formerly Choicepoint. Subsequently acquired by LexisNexis, then First Advantage.

1 P. 23(e)(2). Plaintiff's counsel zealously represented the class and withdrew
2 Plaintiff's first motion for preliminary approval following a dispute of the class size
3 in order to protect the interest of the prospective class. The terms of this settlement
4 were agreed upon only after extensive and hard-fought discovery including multiple
5 involvement of Magistrate Judge Kandis Westmore as well as the filing of a formal
6 motion for class certification. There can be no doubt that Plaintiff's counsel
7 adequately and zealously represented the interest of the class.

8 9 **II. PLAINTIFF'S CLAIMS**

10
11 Plaintiff filed her case under a pseudonym, and if requested, will disclose her
12 true name to this Court. She applied for employment with Frito-Lay, Inc. as a full
13 time packer. She alleges, in her First Amended Class Action Complaint ("FAC") that
14 she was denied employment by Defendant on the basis of an employment background
15 report² that contained erroneous and derogatory information. FAC ¶¶28, 31. She
16 promptly disputed the information which resulted in the issuance of an accurate and
17 clean report but she was never rehired.

18 Under the Fair Credit Reporting Act ("FCRA" 15 U.S.C. §1681 *et seq.*),
19 whenever adverse action is contemplated in whole or in part basis of information
20 disclosed in a consumer report, the "user" of the consumer report must provide pre-
21 adverse action notice compliant with 15 U.S.C. §1681b(b)(3)(A). The notice
22 mandated under this requirement is commonly referred to as "pre-adverse action
23 notice." The idea behind this notice is to allow the consumer an opportunity to review
24 and dispute information in a consumer report before the employment opportunity is
25 lost.

26
27
28 ² They are defined as "consumer reports" under the FCRA. *See* 15 U.S.C.
§1681a(d)(1)(B).

1 Courts have required pre-adverse action notice to be provided within a
2 reasonable time *prior* to the taking of adverse action. Generally, adverse action
3 cannot be taken unless 5 business days have elapsed from the date a pre-adverse
4 action notice is *received*. *Reardon v. ClosetMaid*, 2013 U.S. Dist.LEXIS 169821, *43
5 (W.D. Pa. Dec. 2, 2013) (“*Reardon*”) citing H.R. Rep. 103-486 at 40 (1994) (a
6 “reasonable period for the employee to respond to disputed information is not
7 required to exceed 5 business days following the consumers’ receipt of the consumer
8 report from the employer.”). *See also Megallon v. Robert Half Int’l, Inc.*, 311 F.R.D.
9 625 (D.Or. Nov. 10, 2015).

10 Plaintiff alleges that rather than sending her a pre-adverse action notice, it was
11 Defendant’s routine practice to send a post-adverse action notice informing her that
12 she had already lost her employment. Declaration of Devin H. Fok, (“Fok Decl.”),
13 Ex. 1. The notice was a template letter which provided in part: “We regret to inform
14 you that we have found it necessary to reject your application for employment. This
15 action was influenced by information in an authorized consumer report....” *Cf.* Fok
16 Decl., Ex. 2.

17 The FAC alleges that Defendant did not provide Plaintiff with any opportunity
18 to review and dispute the inaccurate information disclosed in her report before
19 Defendant took adverse action on the basis of the report. FAC ¶¶32, 33. Formal
20 discovery including Rule 30(b)(6) deposition testimony revealed that prior to
21 Defendant’s implementation of a new system on or about April 28, 2014, Defendant
22 uniformly sent only the template post-adverse action letter. After the lawsuit began
23 and after Defendant’s implementation of the new system, Defendant began sending
24 “inquiry letters” to allow applicants to dispute and explain the adverse information
25 disclosed in the consumer report. Fok Decl., Ex. 3.

26 In this type of cases, the damages are hard to calculate as many consumers may
27 have been subject to accurate background check reports regardless of whether pre-
28 adverse action notices were provided. Analysis of the data base revealed that during

1 the class period, 19,607 distinct background check reports were procured and only 29
2 were disputed. Accordingly, under the FCRA, Congress authorized a statutory
3 penalty of \$100 to \$1,000 upon proof of a willful FCRA violation. 15 U.S.C. §1681n.
4 The subject settlement is well within the range of the authorized penalty and is
5 therefore “fair, reasonable, and adequate.”

6 7 **III. THE LITIGATION AND SETTLEMENT OF THE ACTION**

8 9 **A. The Previous Claim-In Settlement**

10
11 Plaintiff initially filed her Class Action Complaint in Alameda County Superior
12 Court (Superior Court Case Number: RG13707606) on December 20, 2013.
13 Defendant removed the action to this Court on February 19, 2014. Defendant also
14 maintained that it “did not maintain a record-keeping system or database” of
15 consumers who were not hired based on information disclosed in their consumer
16 reports. Because of the perceived difficulty in ascertaining the class, the parties
17 initially entered into class-wide settlement comprised of:

18
19 All natural persons residing in the United States, who within five years
20 prior to the filing of the action through the date of Preliminary Approval,
21 were the subject of a consumer report prepared at the request of Frito-
22 Lay for employment purposes, and who received a “flag” from
23 LexisNexis.³

24 To determine who, among these class members were actually not hired because
25 of their consumer reports, the class members were required to self-identify and
26 complete a claim form certifying that they were not hired because of a consumer
27 report. They would know this because they would have received a post-adverse
28 action notice similar to the one sent to Plaintiff. The class would share in a common
fund of \$259,000 inclusive fees and costs. Any remaining undistributed funds would

³ Subsequently purchased by FADV.

1 be forwarded to United Way as a *cy pres* recipient. Built into the settlement was
2 “blow-up” provision where, if the actual class size is more than 3% over the
3 estimated class size, Plaintiff can rescind the settlement.

4 Prior to the preliminary approval hearing, a dispute regarding the class size
5 arose. Moreover, at the hearing, this Court expressed skepticism over the claim-in
6 process and questioned how consumers can self-identify whether they were denied
7 employment on the basis of information disclosed in a consumer report. This Court
8 was also concerned about the appropriateness of United Way as a *cy pres* recipient
9 and whether its mission was related to the goal of the subject class action. The parties
10 acknowledged the Court’s concerns and began discussing a settlement where the
11 Court’s concerns would be addressed.

12 13 **B. Formal Discovery** 14

15 Plaintiff recommenced formal discovery to determine the class size and to
16 ascertain the identity of the class members so as to allow a claims-paid process. Over
17 the course of the next several months, the parties engaged in significant discovery,
18 including multiple depositions, several rounds of written and formal discovery, third-
19 party subpoenas, and the exchange of hundreds of thousands of lines of data. SA, P.
20 8, ¶III.

21 Specifically, multiple databases were obtained from Defendant as well as
22 Defendant’s background check vendor FADV. These databases were also cross-
23 referenced with databases obtained from Defendant’s applicant tracking system
24 vendor HRMC. Hundreds of attorney hours were spent on discovery including
25 extensive meet and confer as well as motion practice.

1 Plaintiff also retained a database expert to analyze the data. Following review
2 of multiple databases, Plaintiff was able to ascertain that 2,897⁴ individuals who were
3 denied due the information disclosed in their consumer reports. *Id.* To assist in the
4 complete identification of all class members, Defendant also sent a company-wide
5 email requesting its human resource personnel in its various branches to identify
6 additional class members whose' applications were not captured in its applicant
7 tracking system. As a result of this search, 31 additional class members were
8 identified. Thus, the total class size in this case is now 2,928. *Id.*

9 10 **IV. THE PROPOSED SETTLEMENT**

11 12 **A. Outline of the Settlement**

- 13
- 14 • Defendant to pay \$950,000 into common fund. SA, P. 6, ¶II.J.
- 15 • This is inclusive of attorney's fees, costs, expenses, and a service award
16 to the Named Plaintiff will be deducted from this fund. SA, P. 6, ¶II.K.
- 17 • No reversion. SA, P. 6, ¶II.L.
- 18 • Defendant will provide to class administrator a class list including the
19 most current address, phone number, email address if available, and
20 social security number. SA, P. 22, ¶VIII.7.c.
- 21 • Class administrator will verify addresses through USPS National Change
22 of Address database; if no known or valid address, skip-tracing will be

23
24
25 ⁴ For the purpose of class certification motion, Plaintiff's expert identified 2,893
26 unique class members exclusively from a database made available by Defendant's
27 applicant tracking system vendor. When negotiating a settlement with Defendant,
28 however, additional sources were used, including Defendant's own compilation and a
database from Defendant's background check company. After removing duplicates,
Plaintiff identified 4 additional members, marginally increasing the class size to
2,897.

used based on the member's social security number. SA, P. 25, ¶VIII.10.d.2.

- A notice packet including the attached long form and short form as well as opt-out notice will be sent to class members within 30 days of preliminary approval. SA, P. 25, ¶VIII.10.d.2.
- Checks will be mailed directly to class members within 30-days of final approval. SA, P. 26, ¶VIII.10.e.
- Any uncashed checks after 60 days will be eligible for a second distribution provided that each check to be sent is equal to or more than \$5.00. SA, P. 26-27, ¶VIII.10.e.
- Any undistributed funds will be distributed *cy pres* to the National Consumer Law Center, a non-profit organization. SA, P. 27, ¶VIII.10.e.
- Plaintiff will petition the court for reimbursement of reasonable costs and expenses as well as up to 33 1/3% of the settlement fund as attorney's fees. SA, P. 20, ¶VIII.6.
- Plaintiff will seek up to \$10,000 as a discretionary service award to be paid directly to Named Plaintiff. *Id.*
- Class members will have 45 days from the mailing of the notice packets to opt out or object. SA, P. 25, ¶VIII.10.d.2; P. 27-28, ¶VIII.f.
- Anybody who does not opt out will be bound by the settlement, which releases all claims which could have been asserted based on the facts as alleged in the complaint during the class period. SA, P.14-15, ¶VIII.3.(a).

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1 **B. Class Definition**

2
3 Because the actual class size is ascertainable and has been ascertained, the
4 parties amended the class settlement definition from their previous settlement. The
5 amended settlement class definition is as follows:

6 All individuals residing in the United States who were the subject of a
7 consumer report obtained by Frito-Lay for employment between
8 December 20, 2011, and February 28, 2014 and (1) for whom a
9 disposition of “Background Check Review – Fail” or “Criminal
10 Background Fail” was entered into Frito-Lay, Inc.’s applicant tracking
11 system; and/or (2) whose report was updated following a dispute with
12 Frito-Lay’s background check vendor; and/or (3) whose applicant file
13 includes a letter or letters sent to the applicant on the basis of the
14 applicant’s failure of pre-employment background check.

15 SA, P.6, ¶H.

16 The parties believe that this definition captures the universe of the consumers
17 who applied to Frito-Lay employment, was not hired because of information in their
18 background check reports and is reasonably ascertainable through Defendant’s
19 electronic and/or physical records.

20 As more fully set forth in Plaintiff’s motion for class certification, Defendant
21 had a policy of requiring its human resource personnel to select the “Background
22 Check Review – Fail” drop-down box whenever an applicant was denied
23 employment due to information disclosed in a background check report. Accordingly,
24 if such an entry was made in Defendant’s applicant tracking system, we know with
25 relatively certainty that the associated consumer was not hired based on information
26 disclosed in his or her background check report.

27 If the appropriate drop-down box was not selected, class members could
28 further be identified through review of their paper records. Because Defendant
maintained a practice of sending post-adverse action notices to applicants including a
copy of their consumer report, the existence of such notice in the applicant’s
employment files readily demonstrate that the applicant was denied employment on

1 the basis of the information disclosed in the consumer report. Moreover, the dispute
2 of any information in a Frito-Lay consumer report readily demonstrates that the
3 applicant received a copy of the report from Frito-Lay which was sent only with the
4 adverse action notice. Accordingly, regardless of whether a copy of the letter is
5 contained in the applicant's physical records, the applicant who disputed his or her
6 report would have likely been denied employment due to a background check report.

7 Following formal discovery, Plaintiff also discovered that Defendant's record
8 keeping processes both electronic and physical were much more extensive after 2011.
9 Accordingly, the parties agree that the two-year class is more appropriate than the
10 previous five-year class.

11 12 **C. Claims-Paid Class Distribution**

13
14 Payment to the class is to be made from the common fund. After deduction of
15 attorney's fees, expenses, and service award, all remaining funds will be distributed
16 pro-rata to the 2,928 class members. Within seven days after Preliminary Approval,
17 Defendant will provide the Settlement Administrator with the class members' name,
18 most current mailing address and telephone number, email address (if available), and
19 social security number. SA, P. 22, ¶VIII.7.c. The addresses of these class members
20 will be checked and updated against the USPS National Change of Address database.
21 SA, P. 25, ¶VIII.10.d.2. For any class members without a valid mailing address, the
22 administrator will proactively use skip-tracing based on the class member's social
23 security number to ascertain their most current address. *Id.*

24 A Notice Packet to opt out of, or object to, the settlement will be sent to
25 verified addresses. Any class members who does not opt out of the settlement will be
26 entitled to a check in an amount equal to the pro-rata distribution from the common
27 fund minus the deductions as outlined above. SA, P. 19, ¶VIII.5.b.ii.

1 The checks will remain valid and negotiable for sixty days from the date of
2 issuance. SA, P. 19, ¶VIII.5.b.iii. A second distribution will be made for any
3 uncashed checks provided that the class members' share of the second distribution
4 equals or exceeds five dollars. SA, P. 19, ¶VIII.5.b.iv. Any further uncashed checks
5 shall be distributed *cy pres* to the NCLC. SA, P. 20, ¶VIII.5.b.v.

6
7 **C. Attorney's Fees and Expenses and a Service Award to the Class**
8 **Representative**
9

10 The Settlement Agreement provides that Class Counsel may move for the
11 Court to award attorney's fees, costs and expenses to be paid from the Gross
12 Settlement Fund. The Fees Award is in an amount not to exceed 33 and 1/3% of the
13 Settlement Fund or \$316,666.67. SA, P. 20, ¶VIII.6. This amount is less than the
14 Plaintiff's counsel's current lodestar.

15 Class Counsel may also petition this Court on behalf of the named Plaintiff an
16 incentive award in an amount not to exceed \$10,000.00. SA, P. 21, ¶VIII.6.

17
18 **D. Cy Pres Recipient**
19

20 The parties have designated NCLC as the *cy pres* recipient. The NCLC is a
21 nationwide non-profit organization that is dedicated to a wide range of consumer-side
22 issues including issues related to employment background check. Its practice consists
23 mainly of policy advocacy and frequently holds conferences on consumer issues
24 including issues related to background screening and the FCRA.

25 In 2012, it published a study detailing the prevalence of background check
26 errors and how it has harmed workers and business. *Nat'l Consumer Law Ctr.,*
27 *Broken Records: How Errors by Criminal Background Checking Companies Harm*
28 *Workers and Businesses* (Apr. 2012) available at <https://www.nclc.org/images/pdf/pr->

[reports/broken-records-reports.pdf](#). The NCLC also author treatises and attorney practice manuals including treatises on the Fair Credit Reporting Act. A *cy pres* award to this organization will advance consumer protection including protection of the rights of workers under the FCRA.

V. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Rule 23 allows courts to conditionally or provisionally certify a class for purposes of effectuating a settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 55 F.3d 768 (3rd Cir. Apr. 17, 1995); *White v. Experian Info. Solutions, Inc.*, 803 F. Supp.2d 1086, 1094 (C.D. Cal. July 15, 2011) (“Where, as here, ‘the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.’”). To certify a class, the court must find that the prerequisites of Rule 23(a) are met, and that the case falls within at least one of the categories listed in Rule 23(b). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. June 9, 1998); *Legge v. Nextel Communications, Inc.*, CV 02-8676-DSF (VNKX), 2004 WL 5235587, *1 (C.D. Cal. June 25, 2004). The same standards generally apply where certification is sought for settlement purposes only, although issues of manageability at trial are not relevant. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (June 25, 1997). Both Rule 23(a) and Rule 23(b) are satisfied here.

A. Rule 23(a) Requirements

Under Rule 23(a), one or more persons may sue as representative parties on behalf of a class if: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims

1 or defenses of the representative parties are typical of the claims or defenses of the
2 class; and 4) the representative parties will fairly and adequately protect the interests
3 of the class. Fed. R. Civ. P. 23(a).

4
5 **a. Numerosity**

6
7 A class action can only be maintained where “the class so numerous that
8 joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); *Legge*, 2004 WL
9 5235587 at *4. But “[t]here is no absolute number at which joinder becomes
10 impracticable. *Legge*, 2004 WL 5235587 at *4 (citing *Gen. Tel. Co. v. EEOC*, 446
11 U.S. 318, 330, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980)). Generally, a class size of
12 approximately 40 members has been held to meet the numerosity requirement. *See*,
13 *e.g.*, *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated and*
14 *rem’d on other grounds*, 459 U.S. 810 (1982) (“we would be inclined to find the
15 numerosity requirement in the present case satisfied solely on the basis of the number
16 of ascertained class members, *i.e.*, 39, 64 and 71”); *Ashmus v. Calderon*, 935 F.Supp.
17 1048, 1064 (N.D. Cal. 1996) (certifying a class of 52 members). Since there are 2,928
18 class members, the numerosity requirement is easily met.

19
20 **b. Commonality**

21
22 Under Rule 23(a)(2), a class must have sufficient commonality, which
23 “requires the plaintiff to demonstrate that the class members have suffered the same
24 injury.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L.Ed. 2d 374
25 (June 20, 2011) (quotation omitted). This requirement is construed “permissively.”
26 *Legge*, 2004 WL 5235587 at *5 (citing *Hanlon*, 150 F.3d at 1019). Commonality is
27 evaluated as to whether the complaint truly “is capable of classwide resolution –
28 which means that determination of its truth or falsity will resolve an issue that is

1 central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S.Ct. at
2 2551.

3 “[C]ommonality is often found in consumer fraud and related actions where
4 standardized documents and procedures are used. This is true for violations of FCRA
5 and ECOA.” *Legge*, 2004 WL 5235587 at *5 (citing *Clark v. Experian Info.*
6 *Solutions, Inc.*, 2002 U.S.Dist.LEXIS 20410, *11 (D.S.C. June 26, 2002) common
7 questions predominate in FCRA action, including whether a “particular practice or
8 policy of writing credit reports” was reasonable.)). Here, every Class member’s claim
9 stems from Defendant’s alleged failure to provide them with a pre-adverse action
10 notice prior to taking adverse action based on a consumer report in violation of the
11 FCRA. 15 U.S.C. §1681b(b)(3)(A).

12 Commonality has been found in two virtually identical cases including claims
13 for failure to provide pre-adverse action notice. *Reardon v. Closetmaid Corp.*, 2011
14 U.S.Dist.LEXIS 45373, at *14 (“Here, there are numerous questions of law or fact
15 common to the class. These include, but are not limited to....whether [defendant]
16 relied on derogatory information in consumer reports to deny employment to the sub-
17 class members in violation of the FCRA...”); *Singleton*, 976 F.Supp.2d at 675
18 (finding common question of “whether [defendant] violated the FCRA by failing to
19 provide employees with copies of their consumer reports and pre-adverse action
20 notice”). *See also Megallon, Megallon v. Robert Half Int’l, Inc.*, *supra*, 311 F.R.D.
21 625 (certifying a class action based on identical claims raised in this litigation);
22 *Thomas v. FTS USA, LLC*, 2016 U.S.Dist.LEXIS 2055 (E.D. Va. Jan. 7, 2016);
23 *Milbourne v. JRK Residential Am., LLC*, 2014 U.S. Dist. LEXIS 155288 (E.D. Va.
24 Oct. 31, 2014); *Manuel v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist.LEXIS 109780
25 (E.D. Va. Aug. 19, 2015).

26 //

27 //

28 //

1 **c. Typicality**

2

3 For similar reasons, Named Plaintiff's representative claim satisfies the

4 typicality requirement of Rule 23(a)(3). Typicality and commonality are similar and

5 tend to merge. *Gen. Tel. Co. of Sw v. Falcon*, 457 U.S. 147, 157 n.13 (June 14, 1982).

6 "Under the rule's permissive standards, representative claims are 'typical' if they are

7 reasonably co-extensive with those of absent class members; they need not be

8 substantially identical." *Hanlon*, 150 F.3d at 1020; *accord Legge*, 2004 WL 5235587

9 at *8 ("As a result of the uniformity with which [Defendant] treated its customers, the

10 Plaintiffs' experiences and claims in some ways are typical of those of the class."). In

11 the instant case, Plaintiff contends that each Class Member had an adverse action

12 taken against them based on their consumer report, and that Defendant failed to

13 provide them with a pre-adverse action notice prior to taking adverse action in

14 violation of the FCRA. Rather, Defendant provides them with a post-adverse action

15 notice which is similar to the notice received by Plaintiff. Accordingly, Plaintiff's

16 claims are typical of the proposed class.

17

18 **d. Adequacy of Representation**

19

20 To make a determination on adequacy, the Court must evaluate both the

21 Named Plaintiffs and their counsel:

22

23 Resolution of two questions determines legal adequacy: 1) do the named

24 plaintiffs and their counsel have any conflicts of interests with other

25 class members and 2) will the named plaintiffs and their counsel

 prosecute the action vigorously on behalf of the class?

26 *Hanlon*, 150 F.3d at 1020.

27 All factors support certification here. There is no conflict of interest that would

28 prevent Named Plaintiff or Class Counsel from representing the proposed Class, and

1 Named Plaintiff and Class Counsel have vigorously pursued the Class’s claims. Class
2 Counsel are experienced class-action litigators who have successfully represented the
3 Named Plaintiff and putative class in this litigation and settlement negotiations.
4 Information about the qualifications of Girardi Keese, the Law Offices of Devin H.
5 Fok, and A New Way of Life Reentry Project are included in the declarations of John
6 A. Girardi, Devin H. Fok, and Joshua E. Kim respectively.

7 8 **B. Rule 23(b)(3) Requirements**

9
10 The Settlement contemplates provisional class certification under Rule
11 23(b)(3). If the elements of Rule 23(a) are satisfied, then a class action may be
12 certified provided the court finds that certain other requirements under Rule 23(b)(3)
13 are met: 1) questions of law or fact common to class members predominate over any
14 questions affecting only individual members, and 2) a class action is superior to other
15 available methods for fairly and efficiently adjudicating the controversy. Fed. R.Civ.
16 P. 23(b)(3); *Hanlon*, 150 F.3d at 1022.

17 The “predominance inquiry tests whether proposed classes are sufficiently
18 cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at
19 623. Predominance is similar to, but “far more demanding” than the commonality
20 requirement. *Id.* at 623-24. The predominance requirement is satisfied because
21 common questions present a “significant portion of the case” that can be resolved for
22 all Class members in a single adjudication. *See Gutierrez v. Wells Fargo Bank, N.A.*,
23 2008 W.L. 4279550, *14 (N.D. Cal. Sept. 11, 2008) (citing *Hanlon*, 150F.3d at 1019-
24 22). As discussed in the commonality and typicality sections above, the most central
25 issue in this litigation is common among all the prospective Class members and the
26 Named Plaintiff. Moreover, it is Plaintiff’s contention that the elements of these
27 nearly identical claims could be shown at trial through common evidence regarding
28

1 Defendant's alleged policies, procedures and practices for sending pre-adverse action
2 notice.

3 Additionally, adjudicating the facts presented in this action on a class-wide
4 basis would be superior to alternative methods of adjudication. "The superiority
5 requirement is generally satisfied where there are 'multiple claims for relatively small
6 individual sums.'" *Legge*, 2004 WL 5235587 at *12 (quoting *Local Joint Exec. Bd.*
7 *Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163
8 (9th Cir. Apr. 11, 2001)). This is because "[w]ithout a class action, the costs of
9 individual litigation as compared to the amount of damages may be prohibitively
10 high," or "the individual plaintiffs' claims are so small that denying class certification
11 would effectively preclude any recovery." *Id.* (recognizing that a class action may not
12 only be the superior method of adjudication of multiple claims with small damages,
13 but may be the only realistic means for class members to adjudicate their claims).

14 The interests of the Class would not be better served by prosecuting their
15 claims individually. *See* Fed. R. Civ. P. 23(b)(3)(A)-(B). Indeed, a class action is only
16 feasible means by which individual applicants can effectively challenge Defendant's
17 conduct, given the relatively modest size of individual claims under the FCRA, which
18 provides for statutory damages of only \$100-1,000 per violation⁵, and the vastly
19

20 ⁵ While the FCRA does provide for recovery of actual damages, 15 U.S.C. §1681o(a)
21 (actual damages for negligent FCRA violation) and 1681n(a) (actual damages for
22 willful FCRA violation), such damages may only be sought where the damage is
23 result of the violation at issue. *See Caltabiano v. BSB Bank & Trust Co.*, 387
24 F.Supp.2d 135 (E.D.N.Y. Aug. 8, 2005) (debtor suing credit agencies unable to
25 recover actual damages where loan-rate increase was based on market rate rather than
26 credit report). Class members who perceive they have actual damages as a result of
27 failing to receive pre-adverse action notice may opt-out of the Settlement. This ability
28 to opt-out has been held to sufficiently protect those class members in similar cases.
See Egge v. Healthspan Services Co., 208 F.R.D. 265, 272 (D. Minn. May 16, 2002)
("[defendant's] alleged concern that individual class members may be able to recover
more in individual actions is adequately addressed by use of the Rule 23(b)(3) opt-out
procedure.") (quotation omitted); *Macarz v. Transworld Systems, Inc.*, 193 F.R.D.46,
55 (D. Conn. Apr. 18, 2000); *Weber v. Goodman*, 9 F.Supp.2d 163,170, 171

superior resources with which Defendant has to defend itself. It is therefore desirable to litigate the issues in this forum on a class-wide basis. *See id.*, at 23(b)(3)(C).

C. The Proposed Settlement More Than Satisfies the Standard for Preliminary Approval

The proposed Settlement Agreement in this case, which provides for a non-reversionary monetary recovery of \$950,000 more than meets the standard for preliminary approval. On a per-class member basis, this settlement is commensurate with settlement of similar FCRA claims. *See Barel v. Bank of Am.*, 255 F.R.D. 393, 402 (E.D. Pa. Jan. 16, 2009) (“The proposed settlement confers \$51.96 of value on each class member, which amounts to...52% of the low end of the damages range and 5.2% of the high end of the damages range”); *Singleton v. Domino’s Pizza, LLC*, 976 F.Supp.2d 665 (D. Md. Oct. 2, 2013) (\$2.5 million FCRA settlement for a claim-in class of 45,668 potential class members); *Hunter v. First Transit, Inc.*, 2011 U.S.Dist.LEXIS 158694 (N.D. Ill. Mar. 15, 2011) (\$5.9 million FCRA settlement for more than 143,000 class members); *Brown et al. v. Lowe’s Companies, Inc., et al.*, 5:13-cv-00079-RLV-DSC (W.D. N.C. 2016) (FCRA settlement, \$35 cash or \$50 gift card per class member); *Johnson v. Midwest Logistics Sys.*, 2013 U.S.Dist.LEXIS 74201 (S.D. Oh. May 25, 2013) (\$452,380 common fund with \$260 for each consumer who has been subject to an adverse consumer report; and \$1,000 for each consumer who has been subject to an adverse consumer report; and was not hired); *Cf Harris v. U.S. Physical Therapy, Inc.*, 2012 U.S.Dist.LEXIS 111844 (D.Nev. July 18, 2012) (\$1,000 each class member for 47-members of the proposed pre-adverse action notice class); *Townsend v. AIM Integrated Logistics, Inc.*, 4:15-cv-00493-KBB (N.D. (E.D.N.Y. Apr. 17, 1998) (deciding a class action in an FDCPA case where individual claims could hve resulted in recoveries of \$1,000 per individual was superior even though the class members would receive no more than \$2 in statutory damages for the defendant’s FDCPA violation).

1 Oh. 2015) (automatic payment of \$1,000 for 206 class members who were not
2 provided pre-adverse action notice); *Reardon v. ClosetMaid, supra*, 2013
3 U.S.Dist.LEXIS 169821 (\$400 to approximately 50 pre-adverse action notice class
4 members after the court granted class certification as to these members).

5
6 **a. The Settlement Is the Product of Serious, Informed, Non-**
7 **Collusive Negotiations**
8

9 As recounted above, the settlement in this case was reached only after
10 extensive formal discovery and after the filing of a formal motion for class
11 certification. This is clear indicia that the settlement was the result of an arm's length
12 negotiation. "An "initial presumption of fairness is usually involved if the settlement
13 is recommended by class counsel after arm's-length bargaining." *Riker v. Gibbons*,
14 2010 WL 4366012, at *2 (D. Nev. Oct. 28, 2010); *see also Hanlon*, 150 F.3d at 1027
15 (affirming approval of settlement after finding "no evidence to suggest that the
16 settlement was negotiated in haste or in the absence of information illuminating the
17 value of plaintiff's claims.").

18
19 **b. The Settlement Does Not Grant Preferential Treatment**
20

21 Preferential treatment is not a concern in this case. The settlement class is for
22 the certification of a single class, with no sub-classes. Every class member will be
23 treated equally, and have an equal opportunity to claim a share of the settlement fund.
24 The settlement does call for a service award for the Named Plaintiff, but the award is
25 subject to the Court's review and approval. Furthermore, the Ninth Circuit has
26 recognized that service awards to named plaintiffs in a class action are permissible
27 and do not render a settlement unfair or unreasonable. *See Stanton v. Boeing Co.*,³²⁷
28

1 F.3d 938, 977 (9th Cir. Apr. 29, 2003); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948,
2 958-69 (9th Cir. Apr. 23, 2009).

3
4 **c. The Settlement Is Adequate and Reasonable**

5
6 While the exact amount that each class member will recover is unknown until
7 all checks have been cashed, the gross settlement amount of \$950,000 is substantial.
8 Assuming that all class members cash their checks they are entitled to \$324.45 before
9 the deduction of attorney's fees, costs, expenses, as well as the discretionary award to
10 the Named Plaintiff.

11 For a vast majority of the consumers, the adverse consumer report information
12 that formed the basis of the "flags" were accurate. Therefore, Frito-Lay would have
13 been justified in denying employment. In litigation, the consumers whose reports
14 contain accurate adverse information will not be able to recover any actual damages
15 outside of the \$100 to \$1,000 statutory penalties.

16 Moreover, the statutory penalty of \$100 to \$1,000 is available only if Plaintiff
17 can establish willful violation of the FCRA. 15 U.S.C. §1681n(a)(1)(A). If the
18 Defendant's violation was at most negligent, recovery is limited to actual damages.
19 *See* 15 U.S.C. §1681o(a)(1).

20 Viewed in the context of the litigation risks faced, as well as the substantial
21 delay, and costs that class members would have experienced in order to receive
22 proceeds from an adversarially-obtained judgment, not to mention the judicial
23 resources required, this settlement is in the best interests of the Plaintiff and the
24 Settlement Class members, and should be approved.

25
26 **D. The Court Should Approve Dissemination of the Proposed Class Notice**

1 With this motion, Plaintiffs have provided two forms of proposed class
2 notice—the short notice to be mailed and the long form notice to be made available
3 on the settlement website and upon request. Fok Decl., SA, Ex. 1 and 2. These
4 proposed notices include all of the information required by Fed. R. Civ. P.
5 23(c)(2)(B). The Long Form Notice contains details about the definition of the Class,
6 the proposed Class Counsel, the size of the settlement fund, the methodology for
7 opting out of or objecting to the settlement, the potential size of Plaintiff's request for
8 attorney's fees, expenses, and class representative incentive awards, and the date and
9 location of the final approval hearing. This notice program exceeds the requirements
10 of Fed. R. Civ. P. 23, and should be approved.

11
12 **VI. CONCLUSION**

13
14 Based on the foregoing, Plaintiffs respectfully request this Court to grant
15 approval to the proposed settlement.

16
17 DATED: June 23, 2016

DHF LAW, P.C.

18 By: /s/ Devin H. Fok
19 Devin H. Fok
20 Attorney for Plaintiff

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